No. 85-1613 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA,

Petitioner,

—v.—

JOHN DOES I, II, III, IV, V and
JOHN DOES, INC., I, II and III,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Of Counsel:

THEODORE V. WELLS, JR., ESQ.
Lowenstein, Sandler, Brochin,
Kohl, Fisher, Boylan & Meanor
65 Livingston Avenue
Roseland, N.J. 07052
201-992-8700
Counsel for John Doe, Inc. II

PAUL R. GRAND
DIANA PARKER
Counsel of Record
Grand & Ostrow
641 Lexington Avenue
New York, New York 10022
212-832-3611
Counsel for John Does I and II and John Doe, Inc. I

WALTER SURREY, ESQ.
Counsel of Record
Jones, Day, Reavis & Pogue
(Surrey & Morse)
1250 Eye Street, N.W.
Washington, D.C. 20005
202-682-4000
Counsel for John Does III, IV and V and John Doe, Inc. III

11pp

Parties to the Proceeding

Respondents are five individuals who were witnesses before the grand jury and three corporations whose documents were subpoenaed by the grand jury.*

---

* The stock of each of the three corporations as well as the stock of the parent of the only corporation that has a parent or a subsidiary is privately held.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1613

UNITED STATES OF AMERICA,

Petitioner,

—v.—

JOHN DOES I, II, III, IV, V and JOHN DOES, INC., I, II and III,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

In November 1981, the Agency for International Development of the Department of State notified the Antitrust Division of the Department of Justice that certain conduct by American companies might warrant investigation for possible violations of the Sherman Act, 15 U.S.C. 1 *et seq*. In March 1982, the Antitrust Division commenced a grand jury investigation; no civil investigation was begun. (Petition at 4) The grand jury investigation continued until the eve of its expiration date, June 8, 1984, although the attorneys for respondents repeatedly questioned whether the acts in issue were within the subject matter jurisdiction of the Sherman Act. In June 1984,

the Antitrust Division informed respondents that the grand jury would not be asked to return any indictments. At the same time, the Antitrust Division instructed the same attorneys who had conducted the grand jury investigation to begin considering filing a civil lawsuit. (*See* App. to Petition at 2a)

On March 6, 1985 the Antitrust Division informed respondents that on November 30, 1984, it had obtained, without notice, an *ex parte* order authorizing disclosure of grand jury materials to the Civil Division. On March 12, 1985, the Antitrust Division informed respondents that it would file a civil complaint based on grand jury materials, and the District Court permitted respondents to see the prior *ex parte* order. On that same date, the District Court denied respondents' applications for vacatur of the *ex parte* order and for protective relief. (App. to Petition at 21a)

On March 15, 1985, the Second Circuit Court of Appeals ordered sealed the complaint expected to be filed by the Antitrust Division on that date and ordered that "[n]o party now privy to the contents of the complaint, the identities of the parties named as defendants therein, or any information derived from the grand jury proceedings used in preparing the complaint, shall disclose such material in any manner whatsoever to any person not now privy to such information." (App. to Petition at 20a) This prohibition remains in effect.

On September 24, 1985, the Second Circuit reversed the *ex parte* Rule 6(e) order and granted the motion to enjoin the Antitrust Division from any further access to or use of the grand jury materials in the civil action. The Second Circuit declined to dismiss the complaint, even though based on grand jury materials, on the ground that the statute of limitations on at least one of the Government's claims had run and the complaint did not specifically quote grand jury materials. (App. to Petition at 17a-18a)

ARGUMENT

None of the usual reasons for granting certiorari are present in this case. No federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter and no important question of federal law which has not been, but should be, settled by this Court is at issue. *See* Rule 17, Rules of the Supreme Court of the United States.

Use of Grand Jury Materials in Civil Litigation

Only two courts of appeals have addressed the issue of whether an attorney of the Antitrust Division of the Department of Justice who has had access to grand jury materials while conducting a criminal investigation may use the same materials in preparing and litigating a civil case without obtaining a disclosure order pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure. Both courts of appeal concluded that such attorneys may not use grand jury materials to litigate civil cases without obtaining a Rule 6(e) order. *United States* v. *Archer-Daniels-Midland*, No. 85-1050, Slip. Op. at 14 (8th Cir. Feb. 24, 1986); *United States* v. *John Doe I, Inc.*, 774 F.2d 34 (2nd Cir. 1985) (App. to Petition at 1a). Thus, no conflict in the circuit courts requires this Court's review.

No important question of federal law that has not been but should be decided by this Court is raised in this case. The only difference between the instant case and *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), is that in *Sells*, Department of Justice Civil Division attorneys wanted to use grand jury materials for the purpose of preparing and litigating a civil lawsuit, while in this case Department of Justice Antitrust Division attorneys wish to do so. The Second Circuit held only that Antitrust Division attorneys, like other attorneys, must obtain a Rule 6(e) order before using grand jury materials to prepare and litigate civil cases.

The Antitrust Division has forthrightly conceded that it has no need to use grand jury materials to prepare and litigate this civil case. Instead, the Antitrust Division has argued that "the 'temptation' to abuse the grand jury that worried the *Sells* Court does not exist in the context of the Antitrust Division's enforcement of the Sherman Act, given the broad investigative powers provided by the Antitrust Civil Process Act, 15 U.S.C. 1311-1314." (C.A. Gov't Br. at 40) In its Petition, the Government argues not that the Antitrust Division needs grand jury materials to litigate civil cases but that obtaining the same information through civil discovery is "costly and time-consuming." (Petition at 15; *see* 16).

If the Antitrust Division does not need to use grand jury materials because of its broad pre-litigation investigative powers, it should not be permitted to do so merely to save "time and expense." This Court has "consistently rejected the argument that such savings can justify a breach of grand jury secrecy." *Sells*, 463 U.S. at 427. "Indiscriminate lifting of the veil of secrecy from the grand jury will forever destroy the effectiveness of the grand jury as an investigative body. . . ." *Lucas* v. *Turner*, 725 F.2d 1095, 1109 (7th Cir. 1984).

Likewise, if the Antitrust Division merely prefers to use grand jury transcripts to litigate civil cases because grand jury testimony is taken without counsel present (while under 15 U.S.C. §§ 1311-14 a witness has a right to counsel and counsel can raise objections to questions), that argument must also be rejected. The purposes of grand jury secrecy include "an interest in protecting witnesses both from retaliation and from undeserved public obloquy when they are haled before the grand jury and questioned vigorously, maybe even browbeaten, without counsel present . . . ." *Illinois* v. *F.E. Moran, Inc.*, 740 F.2d 533, 540 (7th Cir. 1984).

For these reasons, the Second Circuit correctly held that, like other attorneys, attorneys of the Antitrust Division may not use grand jury materials to prepare and litigate a civil case without obtaining a Rule 6(e) order. That holding presents no important question for review.

The Ex Parte Rule 6(e) Order

The second question presented by this case is also not one that needs to be reviewed by this Court. The District Court granted an *ex parte* Rule 6(e) order authorizing the Antitrust Division to disclose the full scope of the grand jury investigation to unspecific numbers of attorneys in the Civil Division and the United States Attorney's Office in order to obtain their advice and ensure consistent federal enforcement of the False Claims Act. (App. to Petition at 22a-23a)

General and legitimate law enforcement goals do not constitute particularized need. *Illinois* v. *Abbott & Associates, Inc.*, 460 U.S. 557, 572 (1983). Blanket disclosure is also not authorized by law. *Abbott*, 460 U.S. at 568. For these two reasons, the Second Circuit correctly held that the disclosure ordered by the District Court in this case was not permissible under Rule 6(e). (*See* App. to Petition at 8a, 10a-11a)

CONCLUSION

For all the foregoing reasons, the Petition should be denied.

Dated: New York, N.Y.
April 28, 1986

Respectfully submitted,

PAUL R. GRAND
DIANA PARKER
Counsel of Record
Grand & Ostrow
641 Lexington Avenue
New York, New York 10022
212-832-3611
Counsel for John Does I and II and John Doe, Inc. I

WALTER SURREY, ESQ.
Counsel of Record
Jones, Day, Reavis & Pogue
(Surrey & Morse)
1250 Eye Street, N.W.
Washington, D.C. 20005
202-682-4000
Counsel for John Does III, IV and V and John Doe, Inc. III

Of Counsel:

THEODORE V. WELLS, JR., ESQ.
Lowenstein, Sandler, Brochin,
Kohl, Fisher, Boylan & Meanor
65 Livingston Avenue
Roseland, N.J. 07052
201-992-8700
Counsel for John Doe, Inc. II